IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 6, 2003 Session

PHILLIP WATSON, ET AL. v. METRO GOVT OF NASHVILLE AND DAVIDSON CO., TN., ACTING BY AND THROUGH THE NASHVILLE ELECTRIC SERVICE POWER BOARD (NES), ET AL.

Appeal from the Circuit Court for Davidson County
No. 02C-683 Thomas W. Brothers, Judge

No. M2003-00035-COA-R3-CV - Filed November 12, 2003

A truck snagged a cable television service line and tore it, together with the power lines of NES which were directly above the television line, from the plaintiffs' residence. Liability was sought to be fastened on NES on the theory that its service power lines were too low. NES relied on its immunity from suit under Tennessee Code Annotated § 29-20-204(b) because it had no actual or constructive notice of any alleged "dangerous or defective condition of a structure or public improvement." The trial court ruled that the response to the motion was insufficient and dismissed the suit. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed

WILLIAM H. INMAN, SR. J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR. and WILLIAM B. CAIN, JJ., joined.

Thurman Thurston McLean, Madison, Tennessee, attorney for Appellants, Phillip Watson and Linda Watson.

Aubrey B. Harwell, III, Aubrey B. Harwell, Jr., Eugene W. Ward, Gerald Neenan and Laura Isreal Smith, Nashville, Tennessee, attorneys for Appellee, Metropolitan Government of Nashville and Davidson County, Tennessee, acting by and through the Nashville Electric Service Power Board (NES).

OPINION

The parties are identified in the style of the case. During the evening of April 25, 2001 the defendant Standford, driving a truck owned by the defendant Martin Transport, LTD., snagged a cable television line connected to the plaintiffs' residence. The power lines of NES were in place directly above the cable television line, and were torn from the plaintiffs' residence, together with the cable television service line, causing a loss of electricity and minor property damage. The

plaintiffs filed this action seeking damages from NES, Martin Transport LTD, and the truck driver, Mr. Standford.

NES is alleged to be liable under the Governmental Tort Liability Act, Tenn. Code Ann. § 29-20-101 et seq., "for creating a dangerous or defective condition of a public structure" and that it "had constructive notice that those power lines were hung in violation of the National Electrical Codes," i.e., at insufficient height above ground level.

NES responded that it had neither actual nor constructive notice of any alleged dangerous or defective condition or placement of its power lines, and was therefore immune from liability under Tenn. Code Ann. § 29-20-204(b).

By Order entered July 31, 2002, all interrogatories were ordered to be served by September 15, 2002, and answered by November 1, 2002. NES filed a motion for summary judgment on September 20, 2002, alleging two (2) grounds, the second of which is dispositive of this litigation: that the plaintiffs' claims are barred by Tenn. Code Ann. § 29-20-204(b) because NES did not have actual or constructive notice of an alleged dangerous or defective condition of any structure or public improvement controlled by it. The motion was supported by (1) a statement of undisputed facts; (2) a memorandum; (3) affidavit of Winston Smith; (4) admission of the plaintiffs.

NES gave notice that the motion would be heard on November 1, 2002. By *agreed order*, a hearing on the motion was continued to November 15, 2002, at which time the motion was granted and the action against NES was dismissed,[1] for the asserted reason that it was immune from suit because it had no actual or constructive notice of a dangerous condition.

The plaintiffs appeal and present for review the propriety of the dismissal of the complaint against NES.

I.

The plaintiffs concede that NES had no actual notice of any dangerous or defective condition in the location or placement of its power lines to the plaintiffs' residence. The issue, therefor, devolves into an enquiry of whether the plaintiffs adduced proof that NES had constructive notice of a dangerous condition which would remove its immunity from suit, keeping in mind that the movant NES supported its motion with proof that it had no constructive notice.

The plaintiffs argue that while they presented no affidavits, they submitted "sufficient information through discovery responses" to create a genuine issue of whether NES could have discovered the existence of a dangerous condition. The record does not clearly reflect the "discovery responses" alluded to. Appellants argue that they "submitted to the Court responses to the 'NES Statement Of Undisputed Facts' by disputing Statement No. 34, and adopting by reference

[1] The action remains pending against the co-defendants, Marten Transport, LTD. and Fred D. Stanford..

'Plaintiffs' Memorandum Of Law In Opposition To Motion For Summary Judgment'" which created a genuine issue of a material fact. Statement No. 34 is a request for admission submitted by NES that it had no constructive notice of a dangerous condition of the power line; the plaintiffs responded to this request merely by stating that the fact of constructive notice was disputed. Plaintiffs further argue that the following responses by NES tend to counter the proof submitted by NES: "NES employs line inspectors to conduct a visual inspection of the poles, wires, and equipment to identify and report any problems or maintenance issues"; "NES lines were not below the minimum established by the National Electric Safety Code, but that the cable television lines were too low"; and these lines were required by the National Electric Safety Code to be placed below the NEW power lines. The appellants then argue that "if the tractor-trailer met the requirements of T.C.A. § 55-7-202, the height of the trailer did not exceed 13 feet, 6 inches." Appellants argue that we may glean from these data that the television line was less than 13.5 feet high, and since NES controlled the "location of all other lines using the utility pole," the resulting inference created a genuine issue of a disputed fact, *i.e.*, that the power line lacked sufficient height.

NES filed the affidavit of Winston Smith, its vice-president, who testified that he had personal knowledge of the matters set forth in his affidavit; that he had reviewed all relevant records of NES to determine if NES was aware of any problem with the service line providing electric current to the residence of the plaintiffs, and that the records revealed no problems, and no report of any problems, and the NES had no indication that the service line was too low. He further testified that the cable television line would hang below the service line.

II.

The standards governing an appellate court's review of a motion for summary judgment are well settled. Since our inquiry involves purely a question of law, no presumption of correctness attaches to the lower court's judgment, and our task is confined to reviewing the record to determine whether the requirements of Tenn. R. Civ. P. 56 have been met. *See* ***Hunter v. Brown***, 955 S.W.2d 49, 50-51 (Tenn. 1997); ***Crowden v. Sovran Bank/Central South***, 816 S.W.2d 741, 744 (Tenn. 1991). Tennessee Rule of Civil Procedure 56.04 provides that summary judgment is appropriate where: (1) there is no genuine issue with regard to the material facts relevant to the claim or defense contained in the motion, *see* ***Byrd v. Hall***, 847 S.W.2d 208, 210 (Tenn. 1993); and (2) the moving party is entitled to a judgment as a matter of law on the undisputed facts. *See* ***Anderson v. Standard Register Co.***, 857 S.W.2d 555, 559 (Tenn. 1993). The moving party has the burden of proving that its motion satisfies these requirements. *See* ***Downen v. Allstate Ins. Co.***, 811 S.W.2d 523, 524 (Tenn. 1991). When the party seeking summary judgment makes a properly supported motion, the burden shifts to the nonmoving party to set forth specific facts establishing the existence of disputed, material facts which must be resolved by the trier of fact. *See*, ***Byrd v. Hall***, 847 S.W.2d at 215.

To properly support its motion, the moving party must either affirmatively negate an essential element of the non-moving party's claim or conclusively establish an affirmative defense. *See* ***McCarley v. West Quality Food Serv.***, 960 S.W.2d 585, 588 (Tenn. 1998); ***Robinson v. Omer***, 952 S.W.2d 423, 426 (Tenn. 1997). If the moving party fails to negate a claimed basis for the suit, the

non-moving party's burden to produce evidence establishing the existence of a genuine issue for trial is not triggered and the motion for summary judgment must fail. *See* ***McCarley v. West Quality Food Serv.***, 960 S.W.2d at 588; ***Robinson v. Omer***, 952 S.W.2d at 426. If the moving party successfully negates a claimed basis for the action, the non-moving party may not simply rest upon the pleadings, but must offer proof to establish the existence of the essential elements of the claim.

The standards governing the assessment of evidence in the summary judgment context are also well established. Courts must view the evidence in the light most favorable to the nonmoving party and must draw all reasonable inferences in the nonmoving party's favor. *See* ***Robinson v. Omer***, 952 S.W.2d at 426; ***Byrd v. Hall***, 847 S.W.2d 210-11. Courts should grant a summary judgment only when both the facts and the inferences to be drawn from the facts permit a reasonable person to reach only one conclusion. *See* ***McCall v. Wilder***, 913 S.W.2d 150, 153 (Tenn. 1995): ***Carvell v. Bottoms***, 900 S.W.2d 23, 26 (Tenn. 1995).

A fact is "material" for summary judgment purposes, if it "must be decided in order to resolve the substantive claim or defense at which the motion is directed." ***Luther v. Compton***, 5 S.W.3d 635, 639 (Tenn. 1999)(quoting ***Byrd v. Hall***, 847 S.W.2d at 211).

The failure of the appellants to file counter-affidavits is not, *per se*, fatal to their cause. Nothing in Tenn. R. Civ. P. 56 requires a party seeking a summary judgment to "deny under oath the allegations of [its] adversary's complaint" or to support its motion with affidavits or other evidentiary materials. Tennessee Rules Civil Procedure 56.01 and 56.02 permit the parties to seek or to defend against summary judgments "with or without supporting affidavits," and Tenn. R. Civ. P. 56.03 empowers the courts to grant summary judgments "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact."

In light of the plain language of Rule 56, the courts are virtually unanimous in holding that a party seeking a summary judgment need not support its motion with affidavits or other evidentiary material. ***Celotex v. Catrett***, 477 U.S. at 323, 106 S. Ct. at 2553; 6 J. MOORE, W. TAGGART, J. WICKER, MOORE'S FEDERAL PRACTICE, para. 56.11[3], at 56-114 (2d ed. 1988); 10A C. WRIGHT, A. MILLER M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2722, at 54-55 (2d ed. 1983).

Parties seeking a Celotex-type[2] summary judgment need not engage in discovery of their own to support their motion. They may carry their burden of demonstrating that their adversary's evidence is insufficient simply by pointing out that the record contains absolutely no evidence establishing an essential element of their adversary's case. Once they do so, the burden of going forward shifts to the non-moving party either to demonstrate how the evidence in the record substantiates their case or to supply the missing evidence. We have recognized that a complaint may be dismissed on summary judgment if the plaintiffs, after being given a reasonable opportunity, are unable to establish an essential element of their case on which they will have the burden of proof at

[2] ***Celotex Corp. v. Catrett***, 477 U.S. 317, 106 S. Ct. 2548 (1986).

trial. ***Stanley v. Joslin***, 757 S.W.2d 328 (Tenn. Ct. App. 1987); ***Moman v. Walden***, 719 S.W.2d 531 (Tenn. Ct. App. 1986).

NES offered proof respecting its lack of constructive notice of any dangerous or defective condition of its service line, thereby obligating the plaintiff to produce sufficient countervailing proof to create a genuine issue of a material fact. We agree with the Circuit Court that the plaintiffs failed to do so.

We next address the argument of the appellants that they had no reasonable opportunity to complete discovery. The argument is not a forcible one, and understandably so in light of the fact that the plaintiffs agreed, without objection, to the date of the hearing of the motion for summary judgment. We see no need to belabor this point further.

Sovereign immunity provides no defense from liability of a government entity, such as NES, if injury results from a dangerous or defective condition of any public structure or improvement owned by the entity, but immunity from suit is not removed for latent defective conditions unless the entity had actual or constructive notice of the condition. Tenn. Code Ann. § 29-20-204(a)(b). The plaintiffs offered no proof that NES had constructive notice of any defect, and it results that immunity bars the claim.

The judgment is affirmed at the costs of the appellants.

_____

WILLIAM H. INMAN, SENIOR JUDGE